United Nations A/66/726

General Assembly

Distr.: General
5 March 2012

Original: English

Sixty-sixth session
Agenda item 134
Programme budget for the biennium 2012-2013

Letter dated 1 February 2012 from the President of the International Court of Justice addressed to the President of the General Assembly

I take this opportunity to communicate to you herewith a paper setting out the comments and concerns of the International Court of Justice with regard to the report of the Secretary-General concerning the comprehensive review of the pension schemes for the members of the International Court of Justice and judges of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda (A/66/617). We have been in communication with the Secretariat to draw its attention to these points, which are in our view important to the United Nations as a whole from an institutional point of view.

Given the fact that the views of the Court have not been adequately reflected in the final version of the document, I have ventured to suggest that you will be kind enough to ensure that the enclosed document is duly examined by the Fifth Committee and that the Court's concerns and reservations be given due and proper consideration in the course of the review by the Assembly of the Secretary-General's report on the pension scheme for members of the Court.

For this reason, I have asked the Secretariat to have this paper circulated in the name of the International Court of Justice as a document of the General Assembly to all members of the Assembly.

(*Signed*) Hisashi **Owada**
President of the International Court of Justice

12-25040 (E) 070312

Please recycle

Annex

[Original: English and French]

Observations and concerns of the International Court of Justice with regard to the report of the Secretary-General concerning the comprehensive review of the pension schemes for the members of the International Court of Justice and judges of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda

Summary

- Impending closure of Tribunals, hence only judges of the International Court of Justice affected — inapplicability of new scheme to serving International Court of Justice judges, therefore concerns only future judges — limited numbers involved.
- Sui generis nature of Court's mission under Charter of the United Nations — settlement of disputes between sovereign and equal States — essential for proper administration of international justice that all judges and legal systems enjoy complete equality of treatment — any adaptation of the pension scheme requires the greatest care.
- Single nine-year term has always constituted autonomous career — taking account of prior employment is open to risk of interference by States — threat to Court's independence — consideration of previous employment also potentially discriminatory — could further discourage candidacy of most highly qualified individuals — Secretary-General has previously expressed himself against consideration of previous employment.
- Irrelevance of situation of judges of other international and national courts and tribunals, as well as of United Nations officials — limited employment possibilities for former Court members — similarities with situation of United Nations Secretary-General.
- Defined-benefit scheme (Option A) — for single-term judge, income replacement level would fall from 50 per cent to 33 per cent — single term always regarded as a full career — placing single-term judges at an even greater disadvantage than at present could adversely effect rotation of the Bench and Court's universal character — interference with system established since 1920.
- Defined-contribution scheme (Option B) — details unclear — unjustified investment assumptions — excessive administration costs — essential that basic principle of non-contribution remain unaffected.
- Lump-sum payment (Option C) — amounts to commutation of pension rights — challenge to established right of judges to receive a pension — incompatibility with Article 32(7) of Court Statute.

- Possibility of "tailoring" pensions of individual judges to take account of acquired pension rights and assets raises serious issues of principle and practice — novel approach, ignores basic principle of equal pay for equal work — privacy issues — complex and costly to administer.
- Conclusion — need to balance disadvantages of proposals to integrity of Statute and efficient functioning of Court against minimal savings envisaged.

I. Background

1. In accordance with General Assembly resolution 65/258, the Secretary-General has prepared a report on the comprehensive review of the pension schemes for the members of the International Court of Justice and judges of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and submitted it to the General Assembly for consideration at the current, sixty-sixth session.

2. Some of the proposals made in the report raise concerns for the Court as to the integrity of its Statute and the status of its members. In order to assist the Assembly in taking the relevant decisions, the Court is pleased to submit a short paper explaining its institutional concerns.

II. Applicability of a new pension scheme

3. The Court would like to begin by drawing the attention of the Assembly to an important point: given the impending closure of the two Tribunals, the proposals in the report would effectively relate solely to members of the International Court of Justice. Under Article 32 of the Court's Statute, the pensions of sitting members of the Court may not be decreased during their term of office. Therefore, as the Secretary-General and the Advisory Committee on Administrative and Budgetary Questions stressed in their respective reports on the matter to the sixty-fifth session,[1] the proposed change, if approved, could not impact upon the pensions of serving or retired judges, who would remain unaffected, with their entitlements continuing on the basis of the existing conditions of service. Hence, the only persons to whom the new scheme would apply would be future judges of the International Court of Justice. Given past and current patterns of rotation, this would be a very limited number of individuals, resulting in correspondingly limited savings to the Organization.

III. Equality of members of the Court

4. When envisaging a new pension scheme, it is essential to maintain sight of the Court's sui generis nature and mission under the Charter of the United Nations, and the constitutional status of its members. It is of fundamental importance for the principal judicial organ of the United Nations, which has to deal with disputes between sovereign States, that strict equality of treatment of all judges on the Bench be guaranteed. Equality between the judges of the Court, as well as between the main forms of civilization and between the principal legal systems of the world that they represent, is a fundamental principle underlying the Statute of the Court. It is therefore absolutely essential for the proper administration of international justice that sovereign States should be assured that the judges they have chosen are sitting on terms of complete equality with the other members of the Court. That is a principle fundamental to ensuring that the sovereign equality of States, which underlies the current international legal system, is also guaranteed in judicial proceedings between them.

[1] See A/65/134 and Corr.1 and A/65/533.

5. The need for equality is not confined to strictly judicial aspects, but also applies to conditions of employment, including salaries and pensions. While the Court appreciates that there may indeed be reasons to adapt pension schemes to changing circumstances over time and that it may not be possible permanently to maintain a pension scheme in a particular form, it is essential that such adaptations do not affect in substance the fundamental principle that all judges should be treated equally.

IV. Nine-year autonomous career and independence of members of the Court

6. In its discussion of the various options, the report effectively — and far more drastically than is now the case — places single-term judges at a disadvantage in relation to those elected to serve a second or further term (see further, para. 18 below). The report seeks to justify this distinction by proposing to take account of judges' previous professional careers and of any pension benefits deriving therefrom. However, membership of the Court is a unique elective position, whose term of nine years has always been treated as an autonomous career. A pension scheme designed to take into consideration prior employments of the members of the Court would face major legal and practical difficulties, and could impede the proper functioning of the institution.

7. The absolute independence expected of the members of the Court (see Article 2 of the Statute of the Court) implies that their previous professional careers cannot be directly linked to their mandate at the Court. Any pension scheme that took account of prior national income and corresponding national pensions would be open to the risk of interference by States through decisions affecting such incomes and pensions, thus directly jeopardizing the institution's independence.

8. Furthermore, establishing a link between the members of the Court and their previous careers would be discriminatory, as the treatment of individuals, even those appointed to the highest offices, varies greatly among the States Members of the United Nations.

9. This could also dissuade candidates from certain countries from standing for election to the Court, notwithstanding the fact that members of the Court should be elected regardless of their nationality. In view of the exceptional nature of the qualifications and experience required to serve at the Court, any measure which might discourage the most highly qualified individuals from standing for election could seriously affect the quality of the institution's judicial work.

10. The Court further notes that, in a previous report, the Secretary-General, in addition to his support for the principle that members of the Court should not contribute to their pension scheme, also took the view that the prior employment of members of the Court should not be taken into consideration in establishing the level of income replacement for their pensions.[2]

[2] A/C.5/50/18.

V. Comparison with other pension schemes

11. Both in the body of the text and in annex II, the report draws a comparison between the pensions of members of the International Court of Justice and members of other international or national courts and tribunals, as well as those of United Nations officials. However, such a comparison is misleading. There is a fundamental difference in the situation of members of the International Court of Justice, who have the specific and unique task of adjudicating upon disputes between sovereign States on any point of international law, and at a universal level.

12. Judges of the International Court of Justice are not officials of the Secretariat, and the General Assembly, recalling that the International Court of Justice is the principal judicial organ of the United Nations, has constantly reaffirmed the principle that the conditions of service and compensation of judges of the Court must be separate and distinct from those of Secretariat officials (resolution 61/262 of 4 April 2007). Resolution 65/258 itself, in paragraph 2, reaffirmed that this principle should govern the Secretary-General's report.

13. Rather, a comparison with the Secretary-General of the United Nations would be more realistic, due to a certain analogy as regards the pension situation of members of the Court and the Secretary-General, on which the General Assembly based itself in establishing the pension plan for Members of the Court, in particular the fact that it is difficult — and seldom appropriate — for retired Members of the Court to resume their previous careers, or indeed to take up any new post.[3]

14. The Court would further point out that, under Practice Direction VIII of the Court, a Member of the Court may not engage in judicial activities as agent, counsel or advocate in a case before the Court during a three-year period following separation from the Court. And indeed, even beyond the mandatory three-year pause, it may be problematic for former Court members, in particular for reasons of confidentiality and professional ethics, to undertake any such activities. Similar difficulties may even arise in relation to advocacy before other judicial bodies. This greatly limits employment possibilities for former members of the Court.

15. Furthermore, comparison with judges in domestic systems or regional organizations is of limited interest, given the wide differences of context in which these respective functions are exercised. Moreover, the greatest care should be exercised when comparing income replacements, because the actual salaries to which they apply differ very widely.

VI. Proposed pension scheme options

16. Further to these general considerations, which are relevant to any pension scheme applicable to the members of the Court, the Court would also like to make some comments on specific issues relating to each of the options for modification of the current pension scheme of members of the Court that are presented in the report.

17. Regarding the defined-benefit scheme (Option A), the Court would recall that, since 1960, the General Assembly, the Court and the Secretariat have accepted that a

[3] Memorandum of the Registrar of the Court dated 13 June 1946, appendix A to the report of the Secretary-General (A/110).

pension amounting to half of the salary of the members of the Court, after a full statutory term of nine years, represented a reasonable replacement income, in view of the specific nature of their judicial function. By contrast, the defined-benefit scheme, which is presented today by the actuary as "an appropriate retirement benefit scheme for new members of the Court" in paragraph 57 of the report, would result in a significant decrease in the pension of a member of the Court after a full term of nine years. In fact, at the end of such a nine-year term, as fixed by the Statute of the Court (Article 13, paragraph 1), the proposed pension scheme would result in a fall in the income replacement level from 50 per cent to 33 per cent.

18. The Court takes this opportunity to recall once again that, pursuant to Article 9 of its Statute, the Court should represent "the main forms of civilization and ... the principal legal systems of the world". The proposed defined-benefit scheme would, far more drastically than it does now, favour judges serving for two terms, or 18 years; at the same time, it would seriously reduce the relevance of the term of nine years which, according to Article 13, paragraph 1, of the Statute, constitutes a career at the Court. This could have adverse consequences for the rotation of the Bench and, in the long term, for the universal character of the Court. It would be inappropriate to interfere with this system, which was established in 1920 and ensures the very existence of the Court.

19. The defined-contribution scheme (Option B) as presented is not particularly clear. As it stands, it is merely based on a general assumption related to investments. Furthermore, the way in which such a pension scheme might be implemented, and the corresponding costs, remain unclear. As the report points out in paragraphs 45 and 47, a defined-contribution scheme would face administrative challenges. The Finance Division of the Registry has very limited resources and could not be responsible for the administration of such a scheme, still less select investments for the benefit of the members of the Court. It would have been interesting to receive calculations of the administrative costs of Option B and to balance these against the limited number of individuals whose pensions would be managed. Moreover, it is obvious that, in such a scheme, the related rights of spouses and dependent children are made more vulnerable.

20. With respect to any such proposal, it is essential that the rationale behind the non-contributory nature of the pensions of members of the International Court of Justice be properly explained, and any proposed change to the pension scheme should take into account the underlying principles justifying its non-contributory nature. It might be useful to recall that the principle of the non-contributory nature of the pensions of the members of the Court was already firmly established under the auspices of the League of Nations, and has been consistently reaffirmed since then. It was linked to the principle, recognized by the Assembly of the League of Nations, of a right to a pension for the members of the Court. The Court further recalls that in 1946, the General Assembly reaffirmed, in its resolution 86 (I) of 11 December 1946, that the costs of pensions of members of the Court were to be borne entirely by the United Nations, that is to say, members of the Court would not have to contribute to the pension fund of the Organization.

21. The report further proposes (Option C) a system based on payment of a cash lump-sum in lieu of a defined pension contribution scheme. This amounts in practice to commutation of the judge's pension in return for a capital payment, with all the uncertainties and imponderables which that involves in terms of future

income. The right of members of the Court to a pension producing a guaranteed income has been recognized since the era of the League of Nations, and has never been challenged. The report rightly points out, in paragraph 52, that the adoption of such a scheme would be difficult to reconcile with Article 32, paragraph 7, of the Statute of the Court. The withdrawal of this right would not only affect the judges directly, but also their spouses and dependent children, whose related rights would also disappear.

22. Furthermore, any attempt to adapt the pension scheme for each individual member of the Court in order to take into account previous assets and acquired pension rights from employment prior to joining the Court would raise a number of other problems, both of principle and in practice. In the first place, such a personalized, "tailor-made" approach to pensions would be a complete novelty in the pension scheme for members of the Court and probably in pension schemes of most other courts, as well as within the United Nations. It would ignore such basic principles as equal pay for equal work and would raise difficult issues of distinguishing between what is considered as "pension" and what is considered as "retirement investment" prompted by tax and other incentives.

23. Over and above these questions of principle, there are privacy issues at stake in asking members of the Court if and how they have invested their money in order to build up their pension rights and other assets during past service. Moreover, national pension schemes vary greatly from country to country and it would be very difficult, if not impossible, to obtain precise information about the amount of national pension a member of the Court would receive upon retirement. Even if judges were to be completely forthcoming in providing such information and it were possible in practice to design a pension scheme based on judges' acquired pension rights and assets, it would be complex and costly to administer, requiring additional capacity which the Court currently does not have. There is a real risk that the additional administrative costs would outweigh any savings in the cost of pensions.

VII. Conclusion

24. The Court would kindly ask the General Assembly, in considering its decision on a new pension scheme, to carefully balance, on the one hand, the disadvantages in terms of the integrity of the constitutional status of the Court and its members, as well as the attractiveness and long-term efficiency of the principal judicial organ of the United Nations, against, on the other hand, the savings envisaged, which in this case would be minimal, given the very small number of persons actually concerned.